Supreme Court, U.S.
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No. 96-245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STEPHEN DANIEL EDWARDS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As we showed in our petition, this case presents important questions of federal constitutional law that this Court expressly left open in *California v. Green*, 399 U.S. 149 (1970), and upon which there is a clear conflict among the state and federal courts. As we also showed, this case—involving a 16-year-old petitioner convicted of murder on the basis of uncorroborated, prior inconsistent statements recanted at trial—presents compelling circumstances for resolving this longstanding conflict.

Significantly, in its brief opposing certiorari the State does not dispute that the Due Process questions raised in the petition are important ones meriting this Court's review. Neither does it deny that the lower courts are divided on the questions. The State furthermore does not dispute that the present case is a particularly persuasive one for resolving the questions, involving, as it does, a murder conviction and life sentence resulting

solely from uncorroborated out-of-court statements of youths who were pressured to make those statements.

Instead, the State opposes review by arguing that the Due Process issues presented were not sufficiently presented below and, in any event, were not expressly left open in *Green*. The State argues, in addition, that many of the conflicting lower court decisions addressing those questions do not involve grand jury testimony.

As we will show, the State's contentions are all either wrong or irrelevant. The questions presented *were* presented to, and decided by, the Maryland courts. They *were* left open in *Green*, and even if they were not, it is undisputed that they are important questions now dividing the lower courts. Furthermore, the fact that not all of the lower court cases involve prior grand jury testimony is irrelevant to the Due Process questions presented. And finally, it is indisputable that the present case is a compelling one for resolving those questions. The petition should be granted.

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

The State contends that the Court should not consider the important issues raised by the petition because they allegedly were not presented to or decided by the Maryland courts. As a related point, the State also contends that the lower court decided this case solely on independent state-law grounds. Neither of these contentions is correct.

1. The State concedes, as it must, that petitioner squarely presented the trial court with the argument that the Due Process Clause of the federal Constitution barred a conviction in this case in light of the unreliability of the prior inconsistent statements upon which the

State's case was based. *See* Opp. at 8-9.[1] Indeed, not only did petitioner raise this argument at trial, but he expressly renewed the argument in his written post-trial motion for a new trial. *See* Memorandum of Law and Argument in Support of Motion for New Trial at 12 (arguing that "[t]he admission of recanted Grand Jury testimony and signed statements, accompanied by abundant indicia of unreliability, violated Defendant's rights to due process of law") (Dec. 27, 1994).

Contrary to the State's contentions, petitioner also renewed this argument at the appellate level, and the Maryland Court of Special Appeals (the only appellate court to have ruled on petitioner's appeal) expressly decided the issue *on due process grounds*. As the State notes, petitioner's appeals in the Maryland courts focused on the then-recent decision in *Nance* v. *State*, 629 A.2d 633 (Md. 1993). But the State fails to mention that *Nance* itself constitutes the Maryland Court of Appeals' application of the federal Due Process Clause to the use of prior inconsistent statements as substantive evidence.

Indeed, in rejecting petitioner's due process arguments, the trial judge in this case—who was himself the author of the *Nance* opinion—stated that:

> On the first aspect of your motion, that is that the statements offend due process and the constitutional guarantee of confrontation, I think those concerns were addressed in *Nance* and *Hardy*. *Nance* and *Hardy*, and subsequently [Maryland Rule of

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[1] The trial transcripts make this abundantly clear. *See* Tr. 6-7, 8, Nov. 29, 1994 (counsel's contention that use of coerced grand jury testimony amounts to a "star-chamber" proceeding that would be "a violation of due process of law"); *id.* at 11-12 (counsel's contention that it "has got to be a violation of due process" when the State calls a witness it knows will recant merely in order to use prior grand jury testimony as substantive evidence). The trial court likewise considered and decided the due process claim. *Id.* at 21, 22.

> Evidence] 5-802.1 . . . have established criteria for the substantive use of prior inconsistent statements by a witness.
>
> The protections that were incorporated in *Nance* and *Hardy* and in the Rule of Evidence *were intended to give force and effect to the constitutional guarantees*.

Tr. 21, Nov. 29, 1994 (McAuliffe, J.) (emphasis supplied).[2] Judge McAuliffe's recollection is plainly borne out by his opinion in *Nance*, which established minimal conditions for the use of inconsistent, out-of-court testimony as substantive evidence and held that "[w]hen all of these conditions have been met, *due process of law is satisfied*." 629 A.2d at 644 (emphasis supplied).

Petitioner unquestionably presented the same argument to the Maryland courts that he now presents to this Court—that his conviction must be reversed in light of the unreliability of the prior inconsistent statements upon which that conviction was based.[3] To preserve a constitutional issue for this Court,

> "[n]o particular words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

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[2] *Hardy* was a companion case to *Nance* decided in the same appeal.

[3] *See* Brief of Appellant at 17-21, *Edwards* v. *State*, No. 99 (Md. Ct. Spec. App. Nov. 24, 1995) (Opp. App. 1a-5a); Petition for Writ of Certiorari at 11-13, *Edwards* v. *State*, Docket No. 646 (Md. Jan. 8, 1996) (Opp. App. 6a-8a).

Street v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).

This standard was plainly satisfied here. Because *Nance* itself rested on an interpretation of the Due Process Clause, petitioner's invocation of *Nance* before the Maryland appellate courts is fairly understood as an invocation of his federal constitutional rights. *See also* Brief of Appellant at 17, *Edwards* v. *State*, No. 99 (Md. Ct. Spec. App. Nov. 24, 1995) (noting that "the Court of Appeals in *Nance* based its analysis of the admissibility of grand jury testimony upon federal law") (Opp. App. 1a).

There is no question, moreover, that the Court of Special Appeals expressly reviewed and decided petitioner's appeal *on due process grounds*. In rejecting petitioner's contention, the Court quoted from and relied on the Court of Appeals' holding in *Nance* that so long as the minimal requirements of that case are met, "'due process of law is satisfied.'" Pet. App. 12a (quoting *Nance*, 629 A.2d at 644). That holding alone is sufficient to preserve the issue for this Court's review, for it is an "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question *was actually considered and decided.*'" *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134 (1914)) (emphasis supplied).[4] For all these reasons, the Due Process questions raised in the petition are properly before the Court.

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[4] *See also Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959); *Whitney* v. *California*, 274 U.S. 357, 361-62 (1927), *overruled on other grounds*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

2. For these same reasons, the Court should also reject the State's contention that the rulings below rest solely on "independent and adequate" state law grounds. *See* Opp. at 11-12. Petitioner contends that the protections afforded him by the Maryland courts in this case fall short of the guarantees provided him under the Due Process Clause of the federal constitution. The Maryland courts' substantive rejection of this federal claim cannot be insulated from this Court's review merely because the courts relied in part on a state rule of evidence in reaching that result. *See, e.g., Hathorn* v. *Lovorn*, 457 U.S. 255, 264-65 (1982) (state court's substantive rejection of federal claim is not an independent and adequate state law ground).

II. THE QUESTIONS PRESENTED ARE IMPORTANT ONES THAT DIVIDE THE LOWER COURTS

It is not surprising that the State devotes most of its brief to arguing that the questions presented are not properly before the Court, for the State cannot refute that these are substantial questions worthy of this Court's review. When it finally addresses the merits of the petition, the State argues (1) that this Court did not leave open any due process issues in *Green*; and (2) that the lower-court conflict on the questions presented does not involve solely grand-jury statements. The first point is wrong, but even if correct, it would not alter the importance of the questions or the lower-court conflict over them. The second point is correct, but irrelevant. The important point is that the lower courts are completely divided over the Due Process requirements affecting the substantive use of uncorroborated, prior inconsistent statements in criminal proceedings.

1. The State asserts that the Court in *Green* "in no way 'left open' due process questions regarding the use of all prior inconsistent statements . . . ." Opp. at 14-15. Even the most cursory reading of this Court's opinion belies that contention. Although in *Green* the Court

rejected the defendant's Confrontation Clause argument, the Court nevertheless expressly noted that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking. . . ." *Green*, 399 U.S. at 164 n.15 (citing *Thompson* v. *Louisville*, 362 U.S. 199 (1960)).

The State contends that this language, which clearly leaves open a due process challenge to the use of prior inconsistent statements as substantive evidence, in fact forecloses such a challenge except where the declarant is unavailable to testify at trial. *See* Opp. at 14-15. That is simply not the case. The Court's statement was made in the context of distinguishing an earlier case, *Bridges* v. *Wixon*, 326 U.S. 135 (1945), which had held that the use of such evidence raised constitutional concerns. In *Bridges*, however, the declarant *was* available to testify, belying the State's present contention that the issue left open in *Green* applies only to absent declarants.

Even more importantly, lower courts applying *Green* have not agreed with the State's present interpretation. As a result, whether or not *Green* left open the question of Due Process limitations on the substantive use of prior inconsistent statements, the lower courts have treated that question as open and are now in conflict on the answer to the question. *See Vogel* v. *Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982) (applying due process analysis left open in *Green* to case involving available declarant); *United States* v. *Orrico*, 599 F.2d 113, 118-19 (6th Cir. 1979) (applying *Green*'s "strong hint" that prior inconsistent statements are insufficient to sustain conviction to case involving available declarant). Moreover, as noted in our petition, *Vogel* and *Orrico* are themselves the basis for numerous, divergent state court rulings on the same issue. *See* Pet. at 18-22. We believe that these courts correctly interpreted *Green* as leaving open the due process issue in circumstances involving available declarants. But even if, as the State contends,

it is debatable whether all of these courts have wrongly interpreted *Green*, this merely presents further reason to grant the petition to resolve that issue.[5]

2. The State likewise fails to rebut our contention that the state and lower federal courts are in conflict over the questions presented. It first contends that the Federal Rules of Evidence and some analogous state rules authorize the admission of prior inconsistent grand jury testimony as substantive evidence. *See* Opp. at 16-17. But that is entirely beside the point. As this Court made clear in *Green*, the scope of evidentiary rules cannot dictate the scope of the federal Constitution. *See Green*, 399 U.S. at 155-56.

The State's attempt to dispel the existence of a conflict on the questions presented essentially rests on its assertion that only two of the cases relied on in our petition involved grand jury testimony. But that is irrelevant. Neither this Court in *Green* nor any of the cases cited in the petition drew any distinction between grand jury testimony and other statements. The rulings in these cases applied to *all* prior inconsistent testimony, and the rulings are hopelessly in conflict. *See* Pet. at 17-22. The State does not, and cannot, refute that central fact.[6]

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[5] The State contends in passing that "due process concerns were dispensed with by then Chief Justice Burger" in his concurring opinion in *Green*. Opp. at 15 n.5. In fact, the Chief Justice was merely noting that the federal Constitution does not necessarily follow traditional hearsay rules. *See Green*, 399 U.S. at 171-72 (Burger, C.J., concurring). But even if he would have "dispensed" with due process challenges entirely, his views alone would not have resolved the issue for the Court and would not alter the conflict that now exists in the lower courts over the issue. It should also be noted that, contrary to the State's implications (*see* Opp. at 15 n.5), Justice Harlan's concurring opinion in *Green* expressly left open the possibility of a due process violation on the facts of that case. *See Green*, 399 U.S. at 189 (Harlan, J., concurring).

[6] It should be noted, furthermore, that the prior inconsistent statements at issue here are not comprised solely of grand jury testi-

[Footnote continued]

Finally, the State wrongly implies that the Maryland courts in fact conducted an independent examination of reliability in this case. *See* Opp. at 22. Yet as the State itself concedes, under the rule applied in this case convictions may be predicated on prior inconsistent statements without *any* independent examination of the reliability of the statements or the circumstances under which they were made, and without *any* corroboration whatever. *Id.* As we have shown, while a small minority of courts follow that approach, others hold that such convictions are impermissible *per se*, and still others require an independent examination of reliability before a conviction can be upheld. There is thus a clear, persistent conflict among the lower courts on the questions presented by this petition.

III. THE PRESENT CASE IS A COMPELLING ONE FOR RESOLVING THE IMPORTANT QUESTIONS PRESENTED

As we explained in the petition, this case—in which a sixteen-year-old boy was convicted and sentenced to life in prison on the basis of recanted out-of-court statements of dubious reliability—plainly presents compelling circumstances for resolving the conflict among the lower courts over the questions presented. In its opposition, the State fails to refute this point.

Specifically, the State does not dispute that this case rests *entirely* on uncorroborated extrajudicial statements from teenage boys regarding petitioner's alleged admis-

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[Footnote continued]

mony. Rather, the trial court also admitted as substantive evidence two unsworn statements allegedly made by Pierre Wilson. *See* Pet. at 6. These were held admissible under *Nance*, because they were signed writings. *See Nance*, 629 A.2d at 643. They would not have been admissible, however, under Fed. R. Evid. 801(d)(1)(A), because they were not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

sions of guilt. Indeed, in its own recitation of the evidence, the State points to *no* evidence of guilt other than these statements. *See* Opp. at 3-6. Nor does the State dispute that these extrajudicial statements were obtained through pressure tactics that even the trial judge found to be questionable. And the State concedes that the vast majority of the statements were expressly recanted at trial. Finally, the State does not dispute that where, as here, a conviction rests upon alleged extrajudicial statements of guilt by the defendant, that conviction cannot be upheld without further corroborating evidence, which was absent from this case. *See Opper* v. *United States*, 348 U.S. 84, 89 (1954).

These undisputed facts, we submit, squarely present the questions this Court left unresolved in *Green*, and present compelling circumstances for resolving the conflict among the lower courts on the resolution of those questions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition should be granted.

Respectfully submitted,

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